

# HOUSE BILL No. 1633

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## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 4-13.6-7; IC 36-1-12.

**Synopsis:** Retainage and bonding for public works projects. Provides that a public works contract may not contain provisions requiring both retainage bonds and payment and performance bonds. Requires the amount of payment and performance bonds to be 150% of the cost of the public works project.

**Effective:** July 1, 1999.

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**Cook**

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January 21, 1999, read first time and referred to Committee on Commerce and Economic Development.

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First Regular Session 111th General Assembly (1999)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 1998 General Assembly.

## HOUSE BILL No. 1633

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A BILL FOR AN ACT to amend the Indiana Code concerning state offices and administration.

*Be it enacted by the General Assembly of the State of Indiana:*

1       SECTION 1. IC 4-13.6-7-1 IS AMENDED TO READ AS  
2       FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 1. (a) The director may  
3       apply this chapter to public works projects with an estimated cost less  
4       than the amounts specified in section 2 or 7 of this chapter.

5       (b) **A public works contract may not contain provisions**  
6       **requiring both of the following:**

7               (1) **Retainage under section 2 of this chapter. If a public works**  
8               **contract does not require retainage, the public works contract**  
9               **must require payment and performance bonds under sections**  
10              **6 and 7 of this chapter if those sections are otherwise**  
11              **applicable to the public works contract.**

12              (2) **Payment and performance bonds under sections 6 and 7 of**  
13              **this chapter. If a public works contract does not require**  
14              **payment and performance bonds, the public works contract**  
15              **must require retainage under section 2 of this chapter if that**  
16              **section is otherwise applicable to the public works contract.**

17       SECTION 2. IC 4-13.6-7-2 IS AMENDED TO READ AS



FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 2. (a) If the estimated cost of a public works project is one hundred fifty thousand dollars (\$150,000) or more, the division shall, **subject to section 1 of this chapter**, include as part of the public works contract provisions for the retainage of portions of payments by the division to the contractor, by the contractor to subcontractors, and for the payment of subcontractors and suppliers by the contractor. The contract must provide that the division may withhold from the contractor sufficient funds from the contract price to pay subcontractors and suppliers as provided in section 4 of this chapter.

(b) A public works contract and contracts between contractors and subcontractors, if portions of the public works contract are subcontracted, must include a provision that at the time any retainage is withheld, the division or the contractor, as the case may be, shall place the retainage in an escrow account, with:

- (1) a bank;
- (2) a savings and loan institution;
- (3) the state of Indiana; or
- (4) an instrumentality of the state of Indiana;

as escrow agent. The parties to the contract shall select the escrow agent by mutual agreement. The parties to the agreement shall enter into a written agreement with the escrow agent.

(c) The escrow agreement must provide the following:

- (1) The escrow agent shall promptly invest all escrowed principal in the obligations that the escrow agent selects, in its discretion.
- (2) The escrow agent shall hold the escrowed principal and income until it receives notice from both of the other parties to the escrow agreement specifying the percentage of the escrowed principal to be released from the escrow and the persons to whom this percentage is to be released. When it receives this notice, the escrow agent shall promptly pay the designated percentage of escrowed principal and the same percentage of the accumulated escrowed income to the persons designated in the notice.
- (3) The escrow agent shall be compensated for its services as the parties may agree. The compensation shall be a commercially reasonable fee commensurate with fees being charged at the time the escrow fund is established for the handling of escrow accounts of like size and duration. The fee must be paid from the escrowed income of the escrow account.

(d) The escrow agreement may include other terms and conditions that are not inconsistent with subsection (c). Additional provisions may include provisions authorizing the escrow agent to commingle the

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escrowed funds held under other escrow agreements and provisions limiting the liability of the escrow agent.

SECTION 3. IC 4-13.6-7-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 6. (a) If the estimated cost of the public works project is at least one hundred fifty thousand dollars (\$150,000), the division shall, **subject to section 1 of this chapter**, require the contractor to execute a good and sufficient payment bond to the department for the state in an amount equal to one hundred **fifty percent** (~~100%~~) (**150%**) of the total contract price. The bond shall include at least the following provisions:

(1) The contractor, its successors and assigns, whether by operation of law or otherwise, and all subcontractors, their successors and assigns, whether by operation of law or otherwise, shall pay all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work.

(2) The bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work.

(3) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(4) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

(b) The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal **one hundred fifty percent (150%) of the total contract price**.

(c) The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

(d) The division shall hold the bond of a contractor for the use and benefit of any claimant having an interest in it and entitled to its benefits.

(e) The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

(f) If the estimated cost of the public works project is less than one hundred fifty thousand dollars (\$150,000) the director may require **only** one (1) of the following:



(1) The contractor must execute a good and sufficient payment bond. The director may determine the amount of the bond to be any percentage, but no more than one hundred **fifty** percent (~~100%~~), (**150%**), of the cost of the project.

(2) The division will withhold retainage under this chapter in an amount of ten percent (10%) of the dollar value of all payments made to the contractor until the public work is substantially completed.

SECTION 4. IC 4-13.6-7-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 7. (a) If the estimated cost of the public works project is at least one hundred fifty thousand dollars (\$150,000) the division shall, **subject to section 1 of this chapter**, require the contractor to execute a good and sufficient performance bond to the department for the state in an amount equal to one hundred **fifty** percent (~~100%~~) (**150%**) of the total contract price. The bond shall include at least the following provisions:

(1) The contractor shall well and faithfully perform the contract.

(2) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(3) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

(b) The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal **one hundred fifty percent (150%)** of the total contract price.

(c) The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

(d) The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

SECTION 5. IC 36-1-12-4.5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 4.5. (a) A bond or a certified check shall be filed with each bid by a bidder in the amount determined and specified by the board in the notice of the letting.

(b) The amount of the bond or certified check may not be set at more than ten percent (10%) of the contract price. The bond or certified check shall be made payable to the political subdivision or agency.

(c) All checks of unsuccessful bidders shall be returned to them by the board upon selection of successful bidders. Checks of successful



1 bidders shall be held until delivery of the performance bond, as  
 2 provided in section 14(c) of this chapter. **the bidder enters into the**  
 3 **public work contract under this chapter.**

4 SECTION 6. IC 36-1-12-13 IS AMENDED TO READ AS  
 5 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 13. (a) A contract for  
 6 public work must contain a provision for the payment of  
 7 subcontractors, laborers, material suppliers, and those performing  
 8 services.

9 (b) **This subsection does not apply if the public work contract**  
 10 **requires a payment bond under section 13.1 of this chapter.** The  
 11 board shall withhold money from the contract price in a sufficient  
 12 amount to pay the subcontractors, laborers, material suppliers, and  
 13 those furnishing services.

14 (c) **A public work contract may not contain provisions requiring**  
 15 **both of the following:**

16 (1) **Retainage under section 14 of this chapter. If a public**  
 17 **work contract does not require retainage, the public work**  
 18 **contract must require payment and performance bonds under**  
 19 **sections 13.1 and 13.3 of this chapter, if those sections are**  
 20 **otherwise applicable to the public work contract.**

21 (2) **Payment and performance bonds under sections 13.1 and**  
 22 **13.3 of this chapter. If a public work contract does not require**  
 23 **payment and performance bonds, the public work contract**  
 24 **must require retainage under section 14 of this chapter if that**  
 25 **section is otherwise applicable to the public work contract.**

26 SECTION 7. IC 36-1-12-13.1 IS AMENDED TO READ AS  
 27 FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 13.1. (a) This section  
 28 applies to contracts for public work only if **both of the following**  
 29 **apply:**

30 (1) The cost of the public work is estimated to be more than one  
 31 hundred thousand dollars (\$100,000).

32 (2) **The public work contract does not require retainage under**  
 33 **section 14 of this chapter.**

34 (b) The contractor shall execute a payment bond to the appropriate  
 35 political subdivision or agency, approved by and for the benefit of the  
 36 political subdivision or agency, in an amount equal to **one hundred**  
 37 **fifty percent (150%) of** the contract price. The payment bond is  
 38 binding on the contractor, the subcontractor, and their successors and  
 39 assigns for the payment of all indebtedness to a person for labor and  
 40 service performed, material furnished, or services rendered. The  
 41 payment bond must state that it is for the benefit of the subcontractors,  
 42 laborers, material suppliers, and those performing services.



(c) The payment bond shall be deposited with the board. The payment bond must specify that:

- (1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;
- (2) a defect in the public work contract; or
- (3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety. The surety of the payment bond may not be released until one (1) year after the board's final settlement with the contractor.

(d) A person to whom money is due for labor performed, material furnished, or services provided shall, within sixty (60) days after the completion of the labor or service, or within sixty (60) days after the last item of material has been furnished, file with the board signed duplicate statements of the amount due. The board shall forward to the surety of the payment bond one (1) of the signed duplicate statements. However, failure of the board to forward a signed duplicate statement does not affect the rights of a person to whom money is due. In addition, a failure to forward the statement does not operate as a defense for the surety.

(e) An action may not be brought against the surety until thirty (30) days after the filing of the signed duplicate statements with the board. If the indebtedness is not paid in full at the end of that thirty (30) day period the person may bring an action in court. The court action must be brought within sixty (60) days after the date of the final completion and acceptance of the public work.

SECTION 8. IC 36-1-12-13.3 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **Sec. 13.3. (a) This section applies to a public work contract if all of the following apply:**

- (1) The amount of the public work contract is more than one hundred thousand dollars (\$100,000).**
- (2) The public work contract is for a project other than highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way.**
- (3) The public work contract does not require retainage under section 14 of this chapter.**

**(b) The contractor shall furnish the board with a performance bond equal to one hundred fifty percent (150%) of the contract price. If acceptable to the board, the performance bond may**



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provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal one hundred fifty percent (150%) of the total contract price. The surety on the performance bond may not be released until one (1) year after the date of the board's final settlement with the contractor. The performance bond must specify that:

- (1) a modification, an omission, or an addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;
- (2) a defect in the public work contract; or
- (3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety.

(c) Actions against a surety on a performance bond must be brought within one (1) year after the date of the board's final settlement with the contractor.

(d) This subsection applies to public work contracts of less than two hundred fifty thousand dollars (\$250,000). The board may waive the performance bond requirement of this section and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution approved by the department of financial institutions instead of a performance bond. Subsections (b) through (c) and section 14.5 of this chapter apply to a letter of credit submitted under this subsection.

SECTION 9. IC 36-1-12-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 14. (a) This section applies to a public work ~~contracts~~ contract if all of the following apply:

- (1) The amount of the public work contract is in excess of one hundred thousand dollars (\$100,000).
- (2) The public work contract is for ~~projects~~ a project other than highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way.
- (3) The public work contract does not require payment and performance bonds under sections 13.1 and 13.3 of this chapter.

This section also applies to a lessor corporation qualifying under IC 21-5-11 or IC 21-5-12 or any other lease-back arrangement containing an option to purchase, notwithstanding the statutory provisions governing those leases.

(b) A board that enters into a contract for public work, and a





contractor who subcontracts parts of that contract, shall include in their respective contracts provisions for the retainage of portions of payments by the board to contractors, by contractors to subcontractors, and for the payment of subcontractors. Either the board or contractor, or both, shall place the retainage in an escrow account, with a bank, savings and loan institution, or the state as the escrow agent. The escrow agent shall be selected by mutual agreement between board and contractor or contractor and subcontractor under a written agreement among the bank or savings and loan institution and:

- (1) the board and the contractor; or
- (2) the subcontractor and the contractor.

(c) To determine the amount of retainage to be withheld, the board shall:

- (1) withhold no more than ten percent (10%) of the dollar value of all work satisfactorily completed until the public work is fifty percent (50%) completed, and nothing further after that; or
- (2) withhold no more than five percent (5%) of the dollar value of all work satisfactorily completed until the public work is substantially completed.

If upon substantial completion of the public work minor items remain uncompleted, an amount computed under subsection ~~(f)~~ (e) of this section shall be withheld until those items are completed.

(d) The escrow agreement must contain the following provisions:

- (1) The escrow agent shall invest all escrowed principal in obligations selected by the escrow agent.
- (2) The escrow agent shall hold the escrowed principal and income until receipt of notice from the board and the contractor, or the contractor and the subcontractor, specifying the part of the escrowed principal to be released from the escrow and the person to whom that portion is to be released. After receipt of the notice, the escrow agent shall remit the designated part of escrowed principal and the same proportion of then escrowed income to the person specified in the notice.
- (3) The escrow agent shall be compensated for the agent's services. The parties may agree on a reasonable fee comparable with fees being charged for the handling of escrow accounts of similar size and duration. The fee shall be paid from the escrowed income.

The escrow agreement may include other terms and conditions consistent with this subsection, including provisions authorizing the escrow agent to commingle the escrowed funds with funds held in other escrow accounts and limiting the liability of the escrow agent.



(e) The contractor shall furnish the board with a performance bond equal to the contract price. If acceptable to the board, the performance bond may provide for incremental bonding in the form of multiple or chronological bonds that, when taken as a whole, equal the contract price. The surety on the performance bond may not be released until one (1) year after the date of the board's final settlement with the contractor. The performance bond must specify that:

(1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;

(2) a defect in the public work contract; or

(3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety.

(f) The contractor shall be paid in full, including all escrowed principal and escrowed income, by the board and escrow agent, within sixty-one (61) days after the date of substantial completion, subject to sections 11 and 12 of this chapter. (e) If within sixty-one (61) days after the date of substantial completion there remain uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. Required warranties begin not later than the date of substantial completion.

(g) Actions against a surety on a performance bond must be brought within one (1) year after the date of the board's final settlement with the contractor.

(h) This subsection applies to public work contracts of less than two hundred fifty thousand dollars (\$250,000). The board may waive the performance bond requirement of subsection (e) and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution approved by the department of financial institutions instead of a performance bond. Subsections (e) through (g) apply to a letter of credit submitted under this subsection.

SECTION 10. IC 36-1-12-14.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **Sec. 14.5. (a) The contractor shall be paid in full, including all escrowed principal and escrowed income, by the board and escrow agent, within sixty-one (61) days after the date of substantial completion, subject to sections 11 and 12 of this chapter.**

**(b) Required warranties begin not later than the date of substantial completion.**

